Ricky Thong Yew Fook & Anor v Arab Malaysian Bank Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)–35 OF 2009(N)
ALAUDDIN PCA, ZULKEFLI AND MOHD GHAZALI FCJJ
1 NOVEMBER 2010

Companies and Corporations — Suit by company — Liquidator — Liquidator sued bank for allowing directors of housing developer to utilise money from account for non-development uses — Whether account was housing development account or current account — Whether bank negligent or breached any statutory duty or committed breach of contract or trust

The second appellant ('the company') was a housing developer that had been wound up by order of court. The first appellant ('the liquidator') was the liquidator of the company. The company had maintained an account ('the account') with the respondent ('the bank') which the liquidator contended was a housing development account ('HD account') within the meaning of the Housing Development (Control and Licensing) Act 1966 ('the Act') and the Housing Development (Housing Development Account) Regulations 1991 ('Regulations'). An employee of the bank had mistakenly issued a written confirmation to the Ministry of Housing and Local Government certifying that the account was a HD account. The liquidator brought an action in the High Court against the bank and two directors of the company. He claimed the bank had permitted the directors of the company to operate the account in a manner that contravened the Act and Regulations and alleged that monies received from purchasers of the company's housing development had been paid into the account from which the directors had drawn out monies by way of cheques for purposes other than housing development and the respondent had paid out on those cheques. The liquidator said about RM1.8m had allegedly been 'misused' in that manner and claimed for that sum against the bank and the two directors. The liquidator claimed the bank had breached its statutory duties under the Act and the Regulations, breached its contractual duties with the company, been negligent and had breached its duty as a constructive trustee for the creditors and beneficiaries of the company. The two directors of the company did not enter appearance and the trial of the action proceeded only against the bank. In its defence the bank said the account was not a HD account but merely a current account and that one of its officers had mistakenly issued the confirmation letter to the Ministry stating that the company had opened a HD account. The High Court found for the appellants holding the bank had been negligent and had caused injury to the company. On appeal, the Court of Appeal reversed the findings and held the Act and Regulations did not impose any duty on the bank; that the liquidator could not sue the bank for

breach of trust; that if any trust existed the beneficiaries thereto were the purchasers of the development; that there was no breach of agreement between the company and the bank and that the bank was not negligent and did not cause any injury to the company. The appellants appealed the decision to the Federal Court.

Held, dismissing the appeal with costs:

(1) The company had for all intents and purposes opened a current account with the bank and not a HD account. Since the company had all along operated and mandated that the bank treat the account as a current account, the appellants were estopped from bringing and maintaining this action against the bank (see paras 20 & 22).

(2) Although the bank's employee had mistakenly issued a written confirmation to the Ministry saying the account was a HD account this was not sufficient to characterise the account as a HD account within the meaning of s 7A of the Act because the written confirmation/certificate contained a manifest error and there was other available evidence to rebut what it asserted. As such, little or no evidentiary value should be given to the erroneous certificate (see para 23).

(3) It was immaterial whether the bank's employee was negligent or not in issuing the confirmation letter to the Ministry that the company had opened a HD account. This was because the banking account was a current account and the appellants suffered no damage whatsoever. The company never acted on the mistaken confirmation and did not even know of its existence until after the Ministry gave them a copy of the mistaken certificate. Far from suffering any damage, the company benefited from the operation of the current account (see para 27).

(4) The Act and Regulations did not impose any duty or obligation on a licensed bank in relation to the operation of a HD account. Hence the bank in this case was not liable for any breach of statutory duty. Nor was the bank in breach of any contract or trust vis-à-vis the company (see paras 10, 24 & 25).

(5) The Act and Regulations provided for a HD account to protect purchasers of a housing project and not anyone else. If the HD account was operated in breach of the Act and Regulations it was for the property purchasers affected to file a claim against the housing developer company or, in the event of breach of trust, against the bank. It was not for the appellants to file a claim as they had no authority to represent or act on behalf of the purchasers (see paras 18, 19 & 26).

[Bahasa Malaysia summary

Perayu kedua ('syarikat tersebut') merupakan pemaju perumahan yang telah digulungkan melalui perintah mahkamah. Perayu pertama ('likuidator

tersebut') merupakan likuidator bagi syarikat tersebut. Syarikat tersebut mempunyai akaun ('akaun tersebut') dengan responden ('bank tersebut') di mana likuidator berhujah merupakan sebuah akaun pembangunan perumahan ('akaun PP') dalam maksud Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut') dan Peraturan-Peraturan Pemaju Perumahan (Akaun Pembangunan Perumahan) 1991 ('Peraturan-Peraturan'). Seorang pekerja bank telah dengan salah mengeluarkan pengesahan bertulis kepada Kementerian dan Kerajaan Tempatan mengesahkan bahawa akaun tersebut merupakan akaun PP. Likuidator telah mengambil tindakan di Mahkamah Tinggi terhadap bank tersebut dan dua orang pengarah syarikat tersebut. Dia mendakwa bank tersebut telah membenarkan pengarah-pengarah syarikat untuk mengendalikan akaun dengan cara yang berlawanan dengan Akta dan Peraturan-Peraturan tersebut dan mendakwa bahawa wang yang diterima daripada pembeli-pembeli pembangunan perumahan syarikat tersebut telah dibayar masuk ke dalam akaun yang mana pengarah-pengarah telah mengeluarkan wang tersebut dalam bentuk cek bagi tujuan lain daripada pembangunan perumahan dan responden telah membayar untuk cek-cek tersebut. Likuidator mengatakan lebih kurang RM1.8 juta didakwa telah disalahgunakan dan menuntut bagi jumlah tersebut terhadap bank dan kedua-dua pengarah tersebut. Likuidator mendakwa bank telah melanggar kewajipan statutori di bawah Akta dan Peraturan-Peraturan, telah melanggar kewajipan kontraktualnya dengan syarikat tersebut, telah cuai dan telah melanggar kewajipannya sebagai pemegang amanah konstruktif untuk pemiutang-pemiutang dan benefisiari-benefisiari syarikat tersebut. Kedua-dua pengarah syarikat tersebut tidak memasukkan kehadiran dan perbicaraan tindakan diteruskan hanya terhadap bank tersebut. Dalam pembelaannya bank mengatakan akaun tersebut bukan akaun PP tetapi sekadar akaun semasa dan bahawa salah seorang daripada pegawainya telah silap mengeluarkan surat pengesahan kepada Kementerian dengan menyatakan bahawa syarikat telah membuka akaun PP. Mahkamah Tinggi membuat dapatan berpihak kepada perayu dengan memutuskan bank telah cuai dan menyebabkan kerugian kepada syarikat tersebut. Semasa rayuan, Mahkamah Rayuan telah mengakas penemuan-penemuan tersebut dan memutuskan Akta dan Peraturan-Peraturan tidak meletakkan sebarang tanggungjawab kepada bank tersebut; bahawa likuidator tidak boleh menyaman bank tersebut untuk pecah amanah; bahawa sekiranya apa-apa amanah wujud benefisiari-benefisiari merupakan pembeli-pembeli pembangunan tersebut; bahawa tidak terdapat pelanggaran perjanjian di antara syarikat dan bank dan bahawa bank tidak cuai dan tidak menyebabkan sebarang kerugian kepada syarikat tersebut. Perayu-perayu telah membuat rayuan keputusan Mahkamah Persekutuan.

Diputuskan, menolak rayuan dengan kos:

(1) Syarikat tersebut telah dengan segala niat dan tujuan membuka sebuah

akaun semasa dengan bank dan bukan sebuah akaun PP. Memandangkan syarikat tersebut selama ini telah menjalankan dan memandat bank untuk menganggap akaun tersebut sebagai akaun semasa, perayu-perayu adalah diestop daripada membawa atau meneruskan tindakan ini terhadap bank tersebut (lihat perenggan 20 & 22).

(2) Meskipun pekerja bank tersebut telah dengan silap mengeluarkan pengesahan bertulis kepada Kementerian mengatakan bahawa akaun tersebut merupakan akaun PP ini adalah tidak mencukupi untuk menyifatkan akaun tersebut sebagai akaun PP dalam maksud s 7A Akta disebabkan pengesahan bertulis/sijil yang mengandungi kesilapan jelas dan wujud keterangan lain untuk mematahkan apa yang ditegaskan. Oleh itu, sedikit atau tiada nilai keterangan patut diberikan kepada sijil yang silap tersebut (lihat perenggan 23).

(3) Ia adalah tidak material sama ada pekerja bank tersebut telah cuai atau tidak dalam mengeluarkan surat pengesahan kepada Kementerian bahawa syarikat tersebut telah membuka akaun PP. Ini adalah kerana akaun perbankan itu adalah akaun semasa dan perayu-perayu tidak mengalami sebarang kerugian sekalipun. Syarikat tersebut tidak pernah bertindak berdasarkan pengesahan yang silap tersebut dan tidak pernah tahu akan kewujudannya sehingga Kementerian memberikan mereka salinan sijil yang salah itu. Jauh daripada mengalami sebarang kerugian, syarikat tersebut telah mendapat faedah daripada pelaksanaan operasi akaun semasa tersebut (lihat perenggan 27).

(4) Akta dan Peraturan-Peraturan tersebut tidak meletakkan sebarang tanggungjawab atau obligasi terhadap bank berlesen berkaitan dengan pelaksanaan operasi akaun PP. Justeru bank tersebut dalam kes ini adalah tidak bertanggungjawab bagi apa-apa pelanggaran kewajipan statutori. Mahupun bank tersebut telah melanggar apa-apa kontrak atau amanah vis-a-vis syarikat tersebut (lihat perenggan 10, 24 & 25).

(5) Akta dan Peraturan-Peraturan tersebut memperuntukkan bagi sebuah akaun PP untuk melindungi pembeli-pembeli projek perumahan dan bukan orang lain. Sekiranya akaun PP telah dioperasikan berlawanan dengan Akta dan Peraturan-Peraturan tersebut, ia adalah untuk pembeli-pembeli hartanah yang terjejas untuk memfailkan tindakan terhadap syarikat pemaju perumahan atau, sekiranya terdapat pelanggaran amanah, terhadap bank. Ia bukanlah untuk perayu-perayu untuk memfailkan tuntutan memandangkan mereka tidak mempunyai autoriti untuk mewakili atau bertindak bagi pihak pembeli-pembeli (lihat perenggan 18, 19 & 26).]

Notes

For a case on liquidator, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 948.

Cases referred to

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65, HC (refd)

Hartog v Colin & Shields [1939] 3 All ER 566 (refd)

Longhurst v Guildford Godalming and District Water Board [1963] AC 265, HL (refd)

Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp [1998] 6 MLJ 150, HC (refd)

Legislation referred to

Companies Act 1965 ss 233, 236(2)(a)

Housing Development (Control and Licensing) Act 1966 ss 7A, 9

Housing Development (Housing Development Account) Regulations 1991 regs 3, 4, 4A, 5, 7, 8, 9, 11, 12, 12A, 12B, 12C

Appeal from: Civil Appeal No N-02–109 of 2007 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Arman-Yunos) for the appellants.

Lim Koon Huan (Arief Emran and Teoh Choon Hui with him) (Skrine) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court at Seremban. Leave to appeal was granted by this court on the following two questions:

(a) whether written confirmation issued by a bank to a housing developer and/or the Ministry of Housing and Local Government ('the Ministry') confirming an account with the bank to be a housing development account constitutes a certificate within the meaning of reg 3 of the Housing Development (Housing Development Account) Regulations 1991;

(b) whether written confirmation issued by a bank to a housing developer and/or the Ministry confirming an account with the bank to be a Housing Development Account is sufficient to characterise the account in issue as a housing development account within the meaning of s 7A of the Housing Development (Control and Licensing) Act 1966 and is

A therefore a trust account.

BACKGROUND FACTS

B **[2]** The first appellant is the liquidator of the second appellant, a company incorporated under the Companies Act 1965 and at the material time was involved in developing a housing project on Lots 16001–16018 at Jalan Rasah, Seremban, Negeri Sembilan ('the development'). The second appellant ('the second appellant company') had been wound up by an order of court. The first C appellant commenced the action in the High Court as liquidator of the second appellant company against the respondent, a licensed bank (the respondent bank') and the two directors of the second appellant company.

D **[3]** The complaint of the first appellant as the Liquidator was that a particular account ('the said account') maintained by the second appellant company with the respondent bank had been permitted by the respondent bank to be operated by the directors of the second appellant company in a manner that contravened the requirements of the Housing Development E (Control and Licensing) Act 1966 ('the Act') and the Housing Development (Housing Development Account) Regulations 1991 ('the Regulations'). To the first appellant the said account was a housing development account ('HD account') within the meaning of the Act and the Regulations, and was as such by law required to be operated in a manner prescribed by the Act and the F Regulations. In this regard, it was also asserted by the first appellant that the said account was a trust account. The first appellant contended that the respondent bank had given a written confirmation to the Ministry that the said account was a HD account.

G **[4]** The first appellant further claimed monies that had been received from purchasers for the purposes of the development and paid into the HD account had been used by the directors of the second appellant company for purposes other than the development. It was discovered by the first appellant that in the period from 12 July 1996 to 1 July 1998 the directors of the second appellant H company drew on the HD account by issuing cheques and the respondent bank had paid out on these cheques. For this the first appellant find fault with the respondent bank. The amounts alleged to be misused amounted to RM1,798,136.79 and it is this amount that the appellants are claiming against the respondent bank and the two directors of the second appellant company. I The appellants' cause of action against the respondent bank is premised on the following grounds:

(a) that the respondent bank had breached its statutory duties under the Act and the Regulations;

(b) that the respondent bank had breached its duty as a constructive trustee for the creditors and beneficiaries of the second appellant company;

(c) that the respondent bank had breached its contractual duties; and

(d) that the respondent bank had been negligent.

[5] The two directors of the second appellant company did not enter an appearance. The trial of the action proceeded only against the respondent bank.

[6] For the respondent bank, it was contended that the said account was not a HD account but was merely a current account maintained by the second appellant company. The second appellant company by way of a letter dated 8 July 1996 had applied to open a current account with the respondent bank. The respondent bank approved the said application under current account No 009–2–000574–8 ('current account'). It is the respondent bank's case that on or about 8 July 1996, one of its officers had mistakenly issued a confirmation letter to the Controller of the Housing in the Ministry ('confirmation letter') stating that the second appellant company had opened a HD account.

FINDINGS OF THE HIGH COURT

[7] The learned trial judge of the High Court approached the case on the basis that there has been an act of negligence on the part of the respondent bank which, as a consequence had caused an injury to the second appellant company. Based on the admission of the officer of the respondent bank ('SD1') that she had signed the confirmation letter, the High Court found that the respondent bank had been negligent and gave judgment to the appellants.

FINDINGS OF THE COURT OF APPEAL

[8] The respondent bank appealed against the decision of the High Court to the Court of Appeal. The Court of Appeal allowed the appeal and amongst others came to the following findings:

(a) The duties as were imposed under the Act or the Regulations were imposed on the second appellant company and not on the respondent bank.

(b) There was no statutory duty imposed on the respondent bank to ensure that the second appellant company utilised money in the said account, even if it were a HD account, for the intended purpose.

(c) No duties were imposed on the respondent bank for any consequence resulting in the issuance of the confirmation letter.

(d) The first appellant as the liquidator could not sue the respondent bank for breach of trust as the only beneficiaries to the trust are the purchasers of the development.

(e) The respondent bank was not negligent as the second appellant company did not suffer any injury. The money in the said account had been spent by the directors on behalf of the second appellant company. The liquidator was merely an extension of the second appellant company. The liquidator further owed no duty to the creditors of the second appellant company.

(f) There was no breach of the agreement between the second appellant company and the respondent bank.

DECISION

[9] It is to be noted at the outset that the confirmation letter by the officer of the respondent bank relied on by the appellants to show that the second appellant company had opened a HD account and that it had complied with the requirements under the Act and the Regulations forms the crux of the appellants' argument in the present appeal. We are of the view that the appellants' reliance on this confirmation letter and their contention on this issue are entirely misconceived for the following reasons:

BREACH OF STATUTORY DUTY

[10] We find there is no statutory duty or obligation imposed on a licensed bank under the Act and the Regulations in relation to the operation of the HD account. The Court of Appeal had rightly pointed out that since the Act and Regulations do not impose any statutory duty on a bank, the respondent bank cannot be held liable for any breach of statutory duty (see the case of *Longhurst v Guildford Godalming and District Water Board* [1963] AC 265 at pp 272 and 274). If at all, in the present case the onus to comply with all the statutory duties imposed by the Act and Regulations rests with the HD account holder, that is, the second appellant company. We shall now examine the relevant provisions of the Act and the Regulations. Regulation 3 of the Regulations provides as follows:

3 Duties of a developer relating to the Account

(1) A licensed housing developer shall within fourteen (14) days after the issuance of a housing developer's license submit to the Controller a certificate from the bank or finance company with whom the Housing Development Account is opened, certifying that such an account has in fact been opened.

(2) The developer shall, within fourteen (14) days after being notified by a purchaser of the name and address of his financier who is financing the purchase,

inform the purchaser's financier of the name and address of the bank in which the Housing Development Account is opened and its account number.

[11] It is to be noted that the first appellant had never complied with the requirements of reg 3 of the Regulations. The housing developer's license was issued to the second appellant company on 27 May 1996, for a three year period. According to reg 3 of the Regulations, the second appellant company is under a statutory duty to submit to the controller a confirmation from the bank or finance company with which the HD account is opened, certifying that such an account has in fact been opened, within fourteen days of the issuance of the housing developer's license, that is by 10 June 1996. The mistaken confirmation made by the respondent bank was given on 8 July 1996. There is also no evidence whatsoever that the second appellant company had ever informed the purchasers' financiers of a HD account. In fact, it appears that the second appellant company did not even know of the existence of the mistaken written confirmation by the respondent bank until after the Ministry gave them a copy of the mistaken certificate on 7 April 1999.

[12] A reference should also be made to the provisions of regs 4, 4A and 5 of the Regulations which specify the type of monies to be paid directly into a HD account as follows:

4 Deposit of all monies paid by purchaser

(1) A licensed housing developer shall deposit forthwith into the Housing Development Account all monies whatsoever, whether in respect of instalments of purchase price or otherwise, paid by a purchaser in relation to his purchase of a housing accommodation in a housing development.

4A Purchaser's financier to pay direct into the Account

(1) A purchaser's financier shall, within twenty-one (21) working days after receiving invoice sent by the licensed housing developer in respect of the progressive payments relating to the purchase of a housing accommodation by the purchaser, deposit directly any payment made into the Housing Development Account with a statement to the licensed housing developer and the purchaser that such payment has been made.

5 Deposit of loans

A licensed housing developer shall deposit into the Housing Development Account any loan obtained for the construction of housing accommodation in a housing development.'

There is nothing to show that the second appellant company had paid any of the monies specified in regs 4, 4A and 5 of the Regulations into the said HD account.

[13] It is to be noted that regs 7, 8, 9 and 11 of the Regulations prohibit the withdrawal of monies from the HD account except for specific purposes stated therein. The said regulations also state that the approval of the controller or a certificate from either the architect, engineer or quantity surveyor (as the case may be) is required before any monies can be withdrawn from a HD account. We reproduce herein the provisions of regs 7, 8, 9 and 11 of the Regulations as follows:

> 7 Purposes for which monies in Housing Development Account may be withdrawn
>
> No monies in a Housing Development Account of a housing development shall be withdrawn by a licensed housing developer except for all or any of the following purposes:
>
> …
>
> 8 Conditions for withdrawal of monies from Housing Development Account
>
> (1) No monies from the Housing Development Account of a housing development shall be withdrawn by a licensed housing developer except where the withdrawal of such money is supported by a certificate from the architect, engineer or quantity surveyor, as the case may be, in charge of the housing development stating that payment is due to be made for that purpose and where such request is supported by documents duly certified by the director, proprietor, partner or office-bearer, as the case may be of the licensed housing developer's company requesting the payment.
>
> …
>
> 9 Withdrawal of surplus monies from Housing Development Account
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> After the issuance of a certificate of fitness for the housing development, the housing developer may, with the approval of the Controller, withdraw any surplus monies in the Housing Development Account after deducting –
>
> 11 Withdrawal of all monies in Housing Development Account
>
> A licensed housing developer may, with the approval of the Controller, withdraw all monies remaining in the Housing Development Account when–(a) the housing development has been completed;
>
> and (b) the solicitor for the licensed housing developer has certified that the obligations of the licensed housing developer in respect of transfer of title under all the sale and purchase agreements in that housing development have been fulfilled.'

[14] We are of the view that the second appellant company had operated the said account all along as a current account and it is for that reason the conditions and prohibitions under regs 7, 8, 9 and 11 were not adhered to, as evident from the 96 cheques which have been drawn from the said account.

[15] Further, contrary to the requirement of a HD account, the second appellant company had never caused the said account to be audited as prescribed by the Act and no report was ever made to the controller as required under s 9 of the Act and regs 12, 12A and 12B of the Regulations. We reproduce the provisions of s 9 of the Act and regs 12, 12A and 12B of the Regulations as follows:

9 Audit (Act)

(1) Subject to subsection (2), every licensed housing developer shall every year or as often as the need arises appoint a person approved by the Minister to be his auditor or auditors; and where a licensed housing developer fails to make the appointment or fails to appoint another auditor in place of an auditor who has resigned his office or dies or whose appointment has been terminated, the Minister may appoint any person or persons who in his opinion is or are fit and proper to be an auditor or auditors …

...

(2) Every auditor of a licensed housing developer shall make a report to the Controller as to the annual balance-sheet and profit and loss accounts of the licensed housing developer for whom the auditor is appointed and shall state in every such report whether or not in his opinion:

(a) the balance-sheet and the profit and loss accounts are properly drawn up and so as to give a true and fair account of the state of the licensed housing developer's affairs;

(b) the accounting and the records examined by him are properly kept; and

(c) if the auditor has called for an explanation or information from the officers or agents of the licensed housing developer, such explanation or information has been satisfactory.

12 Audit (Regulation)

Every auditor of a licensed housing developer shall, in his report to the Controller under section 9(3) of the Act as to the annual balance sheet and profit and loss accounts of the licensed housing developer for whom the auditor is appointed, state whether or not, in his opinion, the monies in the Housing Development Account have been withdrawn in accordance with these Regulations.

12A Audit to make annual report

Every auditor of a licensed housing developer shall, within six months after the close of the financial year of such developer, make an annual report to the Controller as to the Housing Development Account and shall state in every such report whether or not in his opinion —

(a) each and every deposit and withdrawal recorded in the account are in accordance with these Regulations;

(b) the accounting and the records examined by him are properly kept; and

(c) if the auditor has called for an explanation or information from the officers or agents of the developer, such explanation or information has been satisfactory.

12B Auditor to lodge a report to the Controller

An auditor of a licensed housing developer shall immediately, if he found any fraudulent act or misappropriation of money in the Housing Development Account, lodge a report to the Controller together with a full statement and relevant documents relating to the act and the auditor is bound to supply any information or document if requested by the Controller.

[16] It has to be stated here that a contravention of any provision of the Regulations is an offence under reg 12C which states:

12C Penalty

Any person who contravenes any provision under these Regulations shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[17] It is our judgment contrary to the appellants' assertion that the said account was a HD account, the second appellant company certainly did not treat and operate the said account in question as a HD account. The second appellant company themselves did not believe that the said account was HD account and had never complied with any of the statutory requirements associated with the operation and maintenance of a HD account provided under the Act and Regulations.

[18] Even assuming that the said account is a HD account, the provisions of the Act and the Regulations were enacted by Parliament to protect only the purchasers of a housing project and not anyone else. On this point we would like to refer to a passage from the book *Law Governing the Housing Industry* by SY Kok, Butterworths Asia, 1998 at pp 157–158 as follows:

Three years later, the accompanying regulations, known as the Housing Developers (Housing Development Account) Regulations 1991 were enacted the account provisions are aimed at protecting the weak and innocent purchasers …

There are no provisions in s 7A which will impose a statutory duty on any merchant bank, commercial bank or licensed finance company to deposit such loans into the account of the developer concerned … The onus of depositing such inflow of funds lies with the developer/borrower. Any breach of this mandatory duty will expose the errant developer to prosecution; and. upon conviction, will entail a fine which varies from RM10,000 to RM100,000 or to imprisonment for a term not exceeding three years or both. Therefore, the onus is on the developer to diligently perform his or its mandatory or repetitious duty. Should funds be banked into a different or wrong

account, the error should be rectified as soon as it has been discovered. But if such funds or parts thereof should knowingly be withdrawn, then the act of withdrawal will definitely tantamount to a willful breach of s 7A and its related 1991 Regulations.

[19] We are of the view if the HD account was operated in a manner in breach of the Act and Regulations, the fault lies with the second appellant company and it will be for the purchasers of the houses in the housing development who should be filing a claim against the actual wrongdoer, that is, the second appellant company. The first appellant as the liquidator and the second appellant company themselves have no authority to represent or act on behalf of the purchasers. It is trite that if such a party does not complain, it is not the affair of others to complain (see the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p 724).

[20] It is our judgment that the second appellant company had for all intent and purposes opened a current account with the respondent bank and not a HD account. The second appellant company's mandate to the respondent bank as can be seen in the director's resolution pursuant to article 90 of the second appellant company's articles of association clearly states as follows:

That the Bank be instructed to honour all cheques, promissory notes and other orders drawn by and all bills accepted on behalf of the Company, whether the Company's banking account be in credit or otherwise, provided they are jointly signed by the following.

[21] The respondent bank therefore can only operate the said account in strict compliance with the second appellant company's mandate and the respondent bank was obliged to honour the second appellant company's withdrawal of funds in the account so long as there is a credit balance therein. On this point we would like to refer to the case of *Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp* [1998] 6 MLJ 150 wherein Arifin Zakaria J (as he then was) at p 157 had this to say:

It is also to be observed that banker is bound by contract to observe the mandate given by the customer and any breach of the mandate unless ratified by the customer would tantamount to a breach of that contract.

[22] We noted that in accordance with the operation of a current account, from 12 July 1996 to 1 July 1998, 96 cheques were issued by the second appellant company to various payees and for various reasons. All these cheques were honoured and paid out in accordance with the second appellant's mandate to the respondent bank to operate the account as a current account. Since the second appellant company had all along operated and mandated that the

respondent bank treat the account as a current account, the appellants are therefore now estopped from bringing and maintaining this action against the respondent bank.

[23] Although the employee of the respondent bank had mistakenly issued a written confirmation to the controller confirming an account with the bank to be a HD account, this written confirmation in our view is not sufficient to characterise the account in issue as a HD account within the meaning of s 7A of the Act. This is because the written confirmation/certificate contains a manifest error and there is other available evidence to rebut to what it asserts. Case laws have held that in such a situation, little or no evidentiary value should be given to the erroneous certificate (see the case of *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65 at pp 74–751).

BREACH OF CONTRACT

[24] On the appellants' pleaded cause of action under the heading of breach of contract against the respondent bank, it is undisputed that the directors of the second appellant company armed with their company's resolution had in fact opened a current account with the respondent bank and had given mandate to the respondent bank to operate the account according to the terms and conditions attached to the operation of a current account. Therefore, the contractual relationship between the respondent bank with the appellants is only in relation to the operation of the current account. The Court of Appeal had correctly pointed out that the conduct and operation of the current account went without a hitch and as far as the contractual relationship between the banker and the customer goes, there is no breach of any contractual relationship. Also, in respect of the first appellant as the liquidator, he is only an extension of the second appellant company and therefore there is no direct contractual relationship between him and respondent bank to give rise to a breach of contract.

BREACH OF TRUST

[25] On the appellants' pleaded cause of action for breach of trust by the respondent bank, we are of the view that since the relationship between the respondent bank and the second appellant company is that of a debtor and creditor and not one of trusteeship, the appellants' claim that the respondent bank is liable as a constructive trustee for the creditors and beneficiaries of the second appellant company must also fail. The Court of Appeal was correct in holding that the provisions of ss 236(2)(a) and 233 of the Companies Act 1965, restrict the rights of the liquidator as the first appellant to take legal

action to claim for property and things in action belonging to the second appellant company only and not for the second appellant company's creditors. These two sections provide as follows:

> Section 236(2)(a)
>
> The Liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the Company.
>
> Section 233
>
> (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
>
> (2) The Court may, on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf, shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

[26] In any event, the second appellant company's creditors are not beneficiaries of any trust arising from the relationship of the respondent bank and the second appellant company. Even if there is a cause of action under breach of trust, it is the beneficiary of the trust, that is the purchasers of the housing development who should be filing a claim against the respondent bank and not the appellants who have no authority to represent or act on behalf of the purchasers.

NEGLIGENCE

[27] On the appellants' pleaded cause of action for negligence by the respondent bank, we are of the view it is immaterial whether the employee of the respondent bank was negligent or not in issuing the confirmation letter to the controller of the Ministry confirming that the second appellant company had opened a HD account. This is because the banking account was a current account and the appellants suffered no damage whatsoever. In fact the second appellant company had never acted on the said mistaken confirmation. The appellants did not even know of the existence of the written confirmation until after the Ministry gave them a copy of the mistaken certificate on 7 April 1999. It is important to note that far from suffering any damage, the second appellant company had benefited from the operation of the current account. The appellants should not be allowed to enrich themselves by harping on a mistake that they could not and did not reasonably believe in (see the case of *Hartog v*

Colin & Shields [1939] 3 All ER 566 at pp 566–567).

CONCLUSION

[28] For the reasons above stated we would answer the two questions posed in the negative. The appeal by the appellants is therefore dismissed with costs. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed with costs.

Reported by Ashok Kumar